BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DOUGLAS D. KING	)	
Claimant	)	
V.	)	
	)	
SEALY CORPORATION	)	Docket No. 1,059,645
Respondent	)	
AND	)	
	)	
ARCH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through John David Jurcyk, requested review of Administrative Law Judge William G. Belden's April 24, 2015 Award. Keith L. Mark appeared for claimant. The Board heard oral argument on February 4, 2016.

RECORD AND STIPULATIONS

The Board carefully considered the record and adopted the Award's stipulations.

ISSUES

Claimant alleged personal injury to his neck and right shoulder by repetitive trauma on October 18, 2011, but the parties agreed his legal date of injury by repetitive trauma is October 29, 2011, as found by the judge.[1] The judge found claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment and claimant's work activities were the prevailing factor causing his injury, medical condition and impairment. The judge awarded claimant a 15% functional impairment with respect to his cervical spine, but found claimant's right shoulder symptoms were not compensable.

Respondent requests the Award be reversed, arguing claimant failed to prove personal injury by repetitive trauma arising out of and in the course of his employment, including the prevailing factor requirement. Respondent contends claimant had a preexisting degenerative cervical spine condition or a preexisting herniated disc which was rendered symptomatic by his work, which is not a compensable injury under Kansas law. Respondent also argues claimant failed to provide timely notice.

Claimant generally agrees with the judge's Award, but requests it be modified to provide him permanent partial disability benefits based on a 20% functional impairment.

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[1] Respondent's Brief (filed June 3, 2015) at 15; Claimant's Brief (filed July 7, 2015) at 16-17.

The issues[2] for review are:

1. Did claimant sustain personal injury by repetitive trauma that arose out of and in the course of his employment, including whether the alleged repetitive trauma was the prevailing factor causing his injury, medical condition, need for treatment and resulting disability or impairment?

2. Did claimant provide timely notice?

3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began working as a truck driver for respondent on September 13, 2011. He drove an 18-wheel tractor-trailer and delivered mattresses, box springs and sometimes mechanical bed frames. Claimant did not load the truck. When he got to a delivery location, he would have to "tailgate" or move the mattresses to the back end of the trailer.[3] After he tailgated the mattresses, the customer would unload the mattresses. Claimant did not know the exact weight of a mattress and box springs, but estimated they could weigh as much as 200 pounds, depending on the type and size of the mattress.

On October 18, 2011, claimant estimated he delivered 110-120 mattresses and box springs from Kansas City to nine customers in St. Louis.[4] He used a rented tractor-trailer from Penske, not a Sealy rig. He manually moved the mattresses and box springs to the end of the trailer and the customers unloaded them. Claimant had no mechanical devices, such as a cart, to assist him on October 18. He specifically denied any neck pain or other symptoms on October 18 or before.

After finishing his deliveries, claimant was required to lay over in St. Louis in a motel room provided by respondent. He ate dinner and went to bed about two hours after stopping work. Claimant awoke on October 19 with pain at the base of his neck between his shoulder blades that shot down his right arm. He could not grip with his right hand. Claimant never felt similar symptoms before. From the time his work hours ended on October 18 until he awoke the next morning with symptoms, claimant denied any accidents or injuries of any kind. Claimant testified he was injured from lifting mattresses on October 18.

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[2] While respondent lists 10 issues for review in its Application for Review and claimant presents 12 arguments, the parties agreed at oral argument before the Board that only three issues are pertinent.

[3] P.H. Trans. at 12.

[4] Claimant initially testified this work was done on October 19, 2011, but work records prove the work was performed on October 18, 2011. This created confusion in the record.

Claimant drove a tractor and empty trailer back to Kansas City. Upon returning to Kansas City that afternoon, he went straight to the office of Michael Page, D.C. Claimant thought Dr. Page would be able to fix whatever was "out of place."[5] Claimant testified he told Dr. Page what he had been doing the day before and Dr. Page performed an adjustment, which provided minimal relief. Claimant returned to Dr. Page the next day for an adjustment without beneficial effect. Dr. Page recommended claimant see his personal physician, Roman Enriquez, M.D.

Claimant saw Dr. Enriquez within a few days and testified he told the doctor he thought his symptoms had something to do with his work. Dr. Enriquez ordered a cervical spine MRI, referred claimant for a pain management consultation, and later to Stephen Reintjes, M.D., a neurosurgeon.

Respondent's senior accounting coordinator, Janet Wood, noted in an affidavit:

- claimant's wife called her on October 20 and inquired about her husband's health insurance;

- on October 24, Ms. Wood received a voicemail from claimant's wife that claimant injured himself and they wanted to know about union insurance, and claimant later called Ms. Wood and they discussed him needing to fill out insurance paperwork at the union office;

- on October 25, claimant told Ms. Wood in person that: (1) he completed insurance paperwork and (2) he injured his neck on October 20, but did not know how he was injured; and

- on October 25, Ms. Wood asked claimant if he wanted to fill out an employee statement for workers compensation, but he said he did not want to file a workers compensation claim.

Claimant testified he thought he reported his neck and right arm symptoms to respondent on October 24 or 25. Claimant testified he told respondent he "had something going on in [his] neck[,]" but "wasn't quite sure how [he] had done it."[6] He said the only thing he figured could have happened would have been an injury at work on October 18.

In an affidavit, Bryan King, claimant's supervisor, indicated he spoke with claimant on October 25, claimant said he was not able to bid a job because his shoulder hurt, and when asked why, claimant simply said he woke up Monday and his shoulder was hurting.

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[5] P.H. Trans. at 20.

[6] *Id*. at 22.

Ms. Wood's affidavit indicated claimant saw her on October 28 and: (1) he was concerned he was not covered by insurance; (2) he said he did not know how he hurt himself, only that he woke up stiff on October 20; and (3) he did not want to file a workers compensation claim because he was a new hire and did not want to mar his record.

Claimant testified he was taken off work on October 29, although he did not say which doctor gave him the off-work slip.

Ms. Wood's affidavit indicated claimant called her on October 31 to discuss a pending MRI and insurance coverage and his wife left her a voicemail message on November 1 stating they needed to complete an incident report and proceed with a workers compensation claim. Later, claimant's wife again called Ms. Wood. Ms. Wood stated she told claimant's wife claimant consistently said he did not know how he was hurt, he did not want to complete an incident report and did not want to bring a workers compensation claim. The affidavit stated claimant's wife agreed with such information, but they paid $1,200 out-of-pocket for an MRI, there was a potential neurosurgical consultation and claimant must have been hurt at work. Ms. Wood told claimant's wife she would have claimant's supervisor contact her and that Greg Mason, the superintendent, called claimant and said an incident report would be completed and claimant would be sent to a physician.

Claimant testified he believed he reported his injury to Mr. Mason at the end of October or the first part of November, but no later than November 1. Claimant testified he told Mr. Mason he injured himself unloading mattresses in St. Louis, but did not know which particular mattress caused his injury.[7] Claimant testified respondent sent him to the company doctor at its workers compensation clinic after he completed paperwork for a workers compensation claim. Respondent sent claimant to OHS Compcare on November 2 and denied the claim following the appointment.[8]

On November 23, claimant saw Dr. Reintjes for treatment. For reasons unexplained, even by the doctor, he generated two reports stating claimant was delivering mattresses and woke up in his hotel room with neck symptoms. The lengthier report indicated claimant said he injured his neck on October 19 and contained Dr. Reintjes' impression that claimant had right C7 radiculopathy due to an acute right C6-7 disc herniation. Dr. Reintjes stated, "I specifically relate this disc herniation to his work injury of October 19, 2011. I believe that delivering mattresses in St. Louis was a prevailing factor in causing this disc herniation and his resultant disability."[9] Dr. Reintjes recommended physical therapy and restricted claimant's work.

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[7] R.H. Trans. at 29-30, 43.

[8] Such medical record was admitted for preliminary hearing purposes only and was specifically excluded from evidence at the regular hearing.

[9] Reintjes Depo., Ex. 2 at 87.

On December 30, 2011, claimant returned to Dr. Reintjes after physical therapy. While he no longer had arm pain, claimant still had numbness and tingling in the tip of his right index finger. Dr. Reintjes released claimant to return to work effective January 1, 2012, provided he limit overhead work and avoid heavy lifting.

Following a July 26, 2012 preliminary hearing, a special administrative law judge (SALJ) ordered Dr. Reintjes to be claimant's authorized treating physician and awarded claimant temporary total disability (TTD) benefits from October 29, 2011, through December 31, 2011.

On November 2, 2012, claimant returned to Dr. Reintjes and complained of numbness and tingling in his right index finger and middle finger. He reported some pain in the right arm and forearm when turning his head. Dr. Reintjes recommended an MRI, but claimant never had it.

Respondent appealed the SALJ's preliminary hearing order. On November 15, 2012, a single Board Member reversed, finding claimant failed to prove he sustained an October 19, 2011 accidental injury because claimant did not have symptoms that day.

In a May 24, 2014 letter to respondent's attorney, Dr. Reintjes stated:

> Mr. King reported that he woke up on October 20, 2011 with neck and right arm pain, which have been defined in my prior evaluation.
>
> He does not report any event on October 19, 2011, which would have precipitated the neck and right arm pain.
>
> As we discussed on the phone, cervical disc herniation typically present[s] with the patient waking up with neck pain or stiffness and that it can progress to right arm radicular complaints. The occurrence of his cervical disc herniation does not necessarily have to be related to a specific event and in Mr. King's case he does not describe any specific event that is directly related to the onset of his pain.
>
> For this reason, I cannot relate his work activities of October 19, 2011 to the onset of his cervical disc herniation on October 20, 2011. I cannot say to a reasonable degree of medical certainty whether this cervical disc herniation is related to his work activities versus the natural occurrence of a cervical disc herniation.[10]

Dr. Reintjes similarly testified that if claimant had no symptoms during the work day and went to bed asymptomatic, claimant's work was not related to his disc herniation.[11]

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[10] *Id*., Ex. 2 at 82.

[11] *Id*. at 10.

Dr. Reintjes also testified he had inconsistent and problematic opinions.[12] His original opinion was the prevailing factor in claimant's disc herniation was from delivering mattresses in St. Louis.[13] Dr. Reintjes testified claimant lifting upwards of 120 items that weighed anywhere from 100-200 pounds would be forceful enough to herniate a disc. Dr. Reintjes testified claimant never told him about being injured lifting a particular mattress.

Several times during his testimony, Dr. Reintjes stated he believed claimant told him he had symptoms while delivering mattresses. The doctor continued that his prevailing factor opinion was based on claimant's history to him, which included his "distinct impression"[14] that claimant was having symptoms during the work day, a history inconsistent with claimant's testimony.[15] Dr. Reintjes interpreted his November 23 report as suggesting the work day or a work event caused claimant's symptoms. However, he agreed even his own records did not reflect claimant had symptoms the day he was lifting mattresses, only that he had severe pain upon awakening the next day in his hotel room.[16]

Dr. Reintjes further testified:

> A. When I take a history from someone, I try to understand the sequence of events that occur and I try to understand the origin of the pain. My original impression on November 23rd, 2011, was the thoughts that I had formed after seeing the patient, hearing the patient, trying to understand the patient, and I have to stand by my original documentation of November 23rd, 2011.
>
> Q. Just so the court is clear, now that you've had the opportunity to give a more exhaustive review some many years later, it would be your opinion within a reasonable degree of medical certainty, as you stated on November 23rd, 2011, that Mr. King was suffering from a right C7 radiculopathy due to an acute right C6-7 disc herniation, that you specifically relate this disc herniation to his work injury and you believe delivering mattresses in St. Louis was the prevailing factor in causing the disc herniation and resultant disability; is that true today?
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> A. I will say again that I stand by my original report of November 23rd, 2011, and the opinions stated in that report.[17]

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[12] *Id*. at 10, 29, 34, 40.

[13] *Id*. at 25, 40.

[14] *Id*. at 33.

[15] See *Id*. at 33-34, 38.

[16] *Id*. at 23-24, 38.

[17] *Id*. at 30-31.

Dr. Reintjes similarly indicated he would have to stand by his November 23, 2011 prevailing factor opinion, even when specifically asked his prevailing factor opinion regardless of when claimant's symptoms started.[18]

Dr. Reintjes stated claimant's symptoms not manifesting until the next day was "a little bit troubling."[19] Dr. Reintjes acknowledged a herniated disc does not require trauma and can be caused by ordinary activities of life, including waking up after sleeping. Dr. Reintjes estimated 50% of his patients sustained a cervical disc herniation without a known cause, accident or trauma. However, Dr. Reintjes noted claimant's disc herniation was acute, spontaneous or sudden, claimant did not have a preexisting, yet asymptomatic, herniated disc at C6-7 and claimant's injury was not an aggravation of preexisting cervical spine degenerative disc disease or a natural consequence of living and aging.[20]

Three other physicians provided evidence, including P. Brent Koprivica, M.D., Chris Fevurly, M.D., and Terrence Pratt, M.D. All three doctors conducted independent medical evaluations (IMEs), took a history, reviewed medical records and physically examined claimant. At his attorney's request, claimant saw Dr, Koprivica, who is board certified in occupational medicine. Most of Dr. Koprivica's independent medical evaluations (IMEs) are for employees, in the upper 90th percentile. Respondent had claimant evaluated by Dr. Fevurly, who performs about 97-98% of his IMEs for respondents and insurance carriers. Dr. Pratt conducted a court-ordered and neutral IME.

According Dr. Koprivica's report, claimant told him he had onset of his physical symptoms on or about October 18, 2011, from moving 110-120 mattresses without a cart. Dr. Koprivica diagnosed claimant with chronic cervicothoracic pain and radiculopathy based on a right-sided disc herniation at C6-7 and chronic right shoulder pain based on a chronic impingement syndrome. Dr. Koprivica opined claimant's work place activities – moving mattresses over time, including in St. Louis on October 18, 2011 – were the direct, proximate and prevailing factor in his injuries, his impairment, disability and need for his medical treatment, which he found reasonable to cure and relieve the effects of his injuries.

Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereafter *Guides*), Dr. Koprivica placed claimant in Cervicothoracic DRE Category III for a 15% permanent whole body functional impairment. Dr. Koprivica gave claimant a 9% right shoulder impairment, which converts to a 5% whole body functional impairment. Combining the impairments, Dr Koprivica found claimant had a 19% whole body functional impairment, which he rounded to 20% using page 9 of the *Guides*. Dr. Koprivica indicated claimant will require future medical treatment, including injections, physical therapy and possible surgery.

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[18] *Id*. at 40.

[19] *Id*. at 38.

[20] *Id*. at 20-21.

On pages 18-21 of his deposition transcript, Dr. Koprivica testified it was not unusual for claimant not to immediately experience symptoms:

> If you look just from a lay standpoint, most people have experienced if they played high school football, NFL guys, when you talk to them, they compete on Sunday, the NFL as an example, they compete on Sunday, you see those violent forces that are involved, they continue to compete throughout. During the week that following week in terms of when their symptoms are bad, Monday and Tuesday those guys are in the ice bath, they really can't function, and then they recover over time. So seeing symptoms 24 or 48 hours after an event, we see that all the time.
>
> Now, in terms of anatomically if we're talking about this particular case, if someone has an annular injury, the annulus is the containing structure that contains the disc, that annulus is torn when you have a disc herniation or it is partially torn if you have disc bulging. There's an evolution that occurs that's real typical clinically that that evolution will occur over time where the person develops, we call them the radicular symptoms, but the nerve root being impinged that is not necessarily immediate and it may be the next day, it might be days later that you actually see that.
>
> But if you think of what's occurring, at the time of the lifting the annulus is being torn. Now, once the annulus is torn, the potential exists that that disc material can either extrude or bulge to cause impingement on the nerve root. But that doesn't happen at the time of the event. That occurs over time. And as you're even doing activities of daily living, if you think of it like putting a hole in a jelly doughnut is the injury and then over the next day stacking something on top of the jelly doughnut, as you put pressure on the jelly doughnut, then the jelly comes out. And when the jelly comes out, that's the disc putting pressure on the nerve root. That may occur later.
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> So those types of things clinically, those are seen. Now, the putting the hole in the doughnut's really the problem. It doesn't get manifested until you put some pressure on the jelly doughnut to squirt the jelly out. That may not happen until the next day after you've slept overnight, you get up and you start to do your normal activities, which is like putting the pressure on the jelly doughnut, and then that's when you start getting the symptoms.
>
> That's essentially what we're talking about here. That's seen all the time.

Dr. Koprivica admitted claimant had degenerative disease of his cervical spine, which made him more susceptible to annular tears through ordinary activities of life. Dr. Koprivica opined claimant's torn annulus could have happened as early as a month before his radicular symptoms on October 19 and there was a possibility claimant's torn annulus existed before he began working for respondent.

Claimant told Dr. Fevurly he unloaded over 100 mattresses in St. Louis on October 18, 2011, without symptoms until waking up in a motel room the next morning. Claimant complained of constant numbness in the first three fingers of his right hand and a constant mild neck ache, with an occasional stabbing pain. Dr. Fevurly assessed claimant with a disc herniation at C6 or C7 and radiculitis, noting there was no EMG or objective findings needed under the *Guides* to verify radiculopathy. Dr. Fevurly gave claimant a 5% whole person functional impairment under Cervicothoracic DRE Category II of the *Guides*.

In addressing prevailing factor, Dr. Fevurly stated:

> The work activity on October 18, 2011 aggravated preexisting cervical spine degenerative disc disease and spondylosis leading to the onset of right upper extremity C6 vs. C7 radiculitis. The herniated disc most likely **preexisted** the work activity on October 18, 2011 and resulted as a natural consequence of living and aging. This disc herniation was clinically asymptomatic prior to work activity on October 18, 2011. . . .
>
> Taking all of the information into consideration, it is reasonable to accord prevailing factor for the onset of *radiculitis* to the work activity on October 18, 2011 but the herniated disc and degenerative changes in the cervical spine preexisted the work event. He has nearly returned to his pre-work-related injury status and in fact has performed his expected work duties without doctor mandated restrictions over the past 34 months without missed work days.[21]

Dr. Fevurly testified asymptomatic disc herniations are very common. He concluded claimant had degenerative changes in his cervical spine and the disc herniation "almost certainly" preexisted the work event[22] and the disc herniation had nothing to do with claimant's work. Further, the doctor testified claimant developed radiculitis after his work day or the next morning for "whatever reason."[23] The doctor disagreed with Dr. Reintjes' opinion that claimant's disc herniation was acute.

Dr. Fevurly testified claimant's work was unlikely to have been the prevailing factor in the development of his disc herniation and radiculitis, but he also testified claimant's work duties on October 18, 2011, were the prevailing factor in his development of radiculitis. Dr. Fevurly indicated claimant's level of degenerative disc disease could not have developed in the five weeks he worked for respondent.

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[21] Fevurly Depo., Ex. 2 at 7 (bold in original).

[22] *Id*. at 9.

[23] *Id*. at 16.

Claimant complained to Dr. Pratt of numbness in his right index and middle fingers, less frequent numbness affecting his right thumb, right cervical symptoms and weakness of the right arm, which he attributed to moving approximately 120 mattresses weighing 200-300 pounds without a cart on October 19, 2011. Dr. Pratt noted claimant had some preexisting cervical spine disc bulging. The doctor diagnosed claimant with cervicothoracic syndrome with right disc protrusion at C6-7, a small, left-sided protrusion at C3-4, bulging at C5-6 and congenital cervical spinal stenosis, in addition to decreased right shoulder range of motion and preexisting decreased bilateral shoulder range of motion.

In addressing prevailing factor, Dr. Pratt stated on page 5 of his report:

> I could not state to a reasonable degree of medical certainty that the diminished range of motion of his right shoulder relates directly to his reported vocationally related event in 2011. I could not state that he had a specific event to a reasonable degree of medical certainty that resulted in his involvement. There appeared to have been some bilateral shoulder involvement with assessments prior to today in terms of limited range of motion and he was asymptomatic on the left. With bilateral limitations in range of motion of his shoulder and only symptomatic for the right upper extremity symptoms and cervical findings, I could not state to a reasonable degree of medical certainty that there was an event involving the right shoulder resulting in the findings on the current examination.
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> In relationship to his cervical involvement, he had findings suggestive of a disk protrusion with most severe involvement at C6-C7 on the right . . . . He could not recall a specific event . . . but reported performing vocationally related activities and the next day on awakening noting symptoms. . . . If his history is true that he performed activities, heavy activities lifting a couple of 100 pounds on at least . . . 100 occasions without use of the normal cart and awakening the following day with symptoms with no other events known, then it is more likely than not or probable that his symptomatic involvement of the cervical region to right upper extremity occurred in relationship to the vocationally related activities as the prevailing factor. I am unaware of any other significant factors that could have resulted in the involvement. This is specific for cervical symptoms with radicular-type symptoms. There was bulging and that would be considered as preexisting for the cervical region, but there is no evidence of preexisting symptomatic involvement of the cervical region in the information that I have available.

Dr. Pratt gave claimant a 15% whole body functional impairment under Cervicothoracic DRE Category III of the *Guides*.

At the time of the December 2, 2014 regular hearing, claimant continued working for respondent. He still had numbness in the index and middle fingers of his right hand, occasional sharp, stabbing pain in his neck and right arm weakness.

On pages 8-9 of the Award, the judge stated:

> . . . Claimant met his burden of proving his work activities culminating on October 28, 2011 were repetitive in nature and placed him at a greater risk of injury by repetitive use or cumulative trauma. Claimant testified his regular work required him to move mattresses weighing 75-200 pounds 80-130 times as part of the duties of a driver. Claimant's testimony regarding his work activities was uncontradicted. Claimant did not engage in similar activities outside his working life. Claimant testified that on October 18, 2011 in particular, he moved 100 mattresses and box springs without assistive devices, which was also uncontradicted. The Court finds Claimant's work for Respondent placed him at a greater risk of injury by repetitive use or cumulative trauma compared to Claimant's non-working life.[24]

The Award also concluded:

- Claimant established by diagnostic or clinical tests he sustained an injury to the cervical spine, as based on his MRI.

- Claimant proved repetitive trauma was the prevailing factor causing his herniated disc at C6-7 based on the opinions of Drs. Koprivica and Pratt. The judge discounted Dr. Reintjes' contradictory opinions and Dr. Fevurly's opinion, largely based on such physician's refusal to acknowledge that claimant had cervical radiculopathy.

- Claimant's legally operative date of injury by repetitive trauma was October 29, 2011.

- While it was not clear when Claimant told respondent he thought he suffered a work-related injury, his wife gave respondent notice he was seeking workers compensation benefits on November 1, 2011, such that respondent had timely notice claimant was seeking workers compensation benefits.

- Claimant was entitled to TTD from October 29 through December 31, 2011 at $400.02 per week and permanent partial disability compensation based on 15% functional impairment of the body as a whole;

- Claimant was awarded medical treatment for the compensable cervical injury, as itemized in Claimant's Exhibit 4 of the Regular Hearing Transcript.

- Claimant was awarded future medical treatment, either by agreement of the parties or upon application and hearing before the Division of Workers Compensation, and $500 for unauthorized medical.

Respondent appealed.

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[24] The judge found claimant's date of injury by repetitive trauma was October 29, 2011. Award at 10.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment.[25] The burden of proof is on the claimant. To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[26]

K.S.A. 2011 Supp. 44-508 provides, in pertinent part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

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[25] K.S.A. 2011 Supp. 44-501b(b).

[26] K.S.A. 2011 Supp. 44-501b(c).

In no case shall the date of accident be later than the last date worked.

(f) (1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(c) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Board review of a judge's order is de novo on the record.[27] A de novo hearing is a decision of the matter anew, giving no deference to the judge's findings and conclusions.[28] The Board often opts to give some deference to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[29]

ANALYSIS & CONCLUSIONS

Claimant proved an injury by repetitive trauma with a legal date of injury of October 29, 2011, for which he provided respondent with notice by November 2, 2011. He sustained a 15% impairment of function as a result of his cervical spine injury.

Claimant did not maintain his original theory that he sustained a singular accident on October 18, 2011. His testimony establishes he sustained injury by repetitive trauma throughout the workday on October 18, 2011. A compensable injury by repetitive trauma does not require the presence of identified symptoms during a particular work shift.

There is insufficient evidence claimant's injury solely aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic. Dr. Reintjes stated claimant's herniation was acute and not an aggravation of degenerative disc disease. Dr. Pratt similarly diagnosed a disc protrusion at C6-7, while only noting prior disc bulging. Dr. Pratt's statement that claimant had symptomatic involvement of the cervical region due to moving the mattresses means claimant's injury was due to his work, not that claimant's work made an asymptomatic condition symptomatic.

Even if claimant had an aggravation of a preexisting condition, K.S.A. 2011 Supp. 44-508(f)(2) only bars compensability for injuries which "solely" aggravate a preexisting condition. The Legislature intended the word "solely" to mean something. The Kansas Workers Compensation Act does not define the term, but "solely" is judicially defined as "singly" or "[e]xclusively."[30] Because claimant sustained a new disc herniation, he had more than a sole aggravation of any preexisting condition.[31]

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[27] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995). See also K.S.A. 2011 Supp. 44-555c(a).

[28] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[29] It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

[30] *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 2010 WL 1462763 (Kansas Court of Appeals unpublished opinion dated Apr. 8, 2010).

[31] See *Le v. Armour Eckrich Meats*, ___ Kan. App. 2d ___, ___ P.3d ___, 2015 WL 8622545 (2015).

Claimant provided notice of an injury by repetitive trauma. Claimant told Mr. Mason, a superior, that he believed he injured his neck moving mattresses in St. Louis. The judge concluded, and the parties agreed, claimant's legal date of injury by repetitive trauma was October 29, 2011. Mr. Mason had claimant complete an incident report and respondent sent him to its occupational medicine clinic on November 2, 2011. Based on the credible evidence, respondent had notice of claimant's injury by repetitive trauma no later than November 2, 2011. The fact claimant initially pled an accident, but later alleged repetitive trauma, does not diminish claimant's testimony (regardless of his legal theory) that he told Mr. Mason he was hurt moving mattresses in St. Louis. Mr. Mason did not refute claimant's testimony.

The Board otherwise adopts the judge's well-written and well-reasoned opinion to the extent it is not inconsistent with our findings and conclusions.

CONCLUSIONS

- Claimant sustained personal injury by repetitive trauma that arose out of and in the course of his employment. He satisfied the prevailing factor requirement.

- Claimant provided timely notice.

- Claimant sustained a 15% whole body impairment.

AWARD

WHEREFORE, the Board affirms the April 24, 2015 Award to the extent it is consistent with our ruling.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable William G. Belden